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Re: ***Liberty Mutual Group v. Ryan T. Rush and Wilmington Housing Authority***
Civil Action No. 04-03-085

LETTER OPINION

Dear Counsel:

This is the Court's decision after trial in the above-referenced civil action. In this case John Miller (hereinafter "Miller") and Liberty Mutual Group, as subrogee of Miller (hereinafter "Liberty Mutual" or "Plaintiff") bring this proceeding to recover for damages to Miller's motor vehicle as a result of a collision occurring on March 4, 2002. The second vehicle was operated by Defendant Ryan T. Rush (hereinafter "Rush" or "Defendant") and owned by Co-Defendant Wilmington Housing Authority (hereinafter "WHA").

Plaintiff alleges that Defendant WHA is vicariously liable for damages in that Defendant Rush was operating the vehicle at the express direction of his father, David Rush, an employee of WHA, in order to move the vehicle to avoid possible damage to the vehicle by an unstable basketball goal. Defendant WHA denies liability in that Defendant Ryan Rush was not an agent, servant or employee of WHA, that David Rush's direction to his son was improper and that the proper direction must come from the Executive Director of Wilmington Housing Authority.

FACTS

On March 4, 2002 Samantha Mohr was returning home from the University of Delaware, driving a 2001 Pontiac Grand AM owned by Plaintiff John Miller, her stepfather. She was driving the vehicle with his permission.

Ms. Mohr testified that, as she turned onto Torrington Way from Old Baltimore Pike she observed a white van in the farthest left opposite lane of Torrington Way, but facing in the same direction as she was traveling. She testified that she was driving within the only lane of Torrington Way for travel in her direction. As she passed the white van she said the van collided with her vehicle on her driver's side "right by my door," causing damage from the rear door to the bumper "above the (rear) wheel". She testified that the van sustained damage to the front right (passenger side) headlight. Defendant Rush testified that he saw Ms. Mohr's vehicle before the collision and that he stopped his vehicle "5 or 6 feet before the yellow lines separating the lanes on Torrington Way and that Ms. Mohr "came in (turning) wide and hit me". He said his vehicle was not moving when the collision occurred.

The testimony of the two drivers as to what occurred next is quite different. Ms. Mohr testified that Defendant Rush asked her not to call the police. Defendant Rush testified that Ms. Mohr stated, "I can't believe I hit you. What do you suggest I do?" Rush testified he said, "no need to call the police." In any event those two drivers left the scene without notifying police and, as a result, the police report admitted into evidence shows only a "possible point of impact, vehicles moved prior to arrival."

Ms. Mohr testified that, as a result of the collision, she was thrown sideways, her head hitting the sun visor, that she received bruises from the seatbelt she was wearing and that later her neck hurt. She received treatment for her injuries, including shoulder injuries, from various doctors, over a period of five (5) months.

Judith Van Dame, claims specialist for Liberty Mutual Group, testified regarding funds paid by her company for medical expenses to Samantha Mohr and property damage to John Miller's vehicle. The funds paid out were in excess of the $4,941.79 prayed for in Plaintiff's Complaint. Counsel for Plaintiff, in his opening statement, indicated that he would not move to amend the complaint and the amount of damages prayed for is apparently not at issue.

David Rush, father of Defendant Ryan T. Rush, testified that he has been employed by Defendant Wilmington Housing Authority for more than 16 years, most recently as an Asset Manager and Risk Control Officer. He testified that he had the use of the white van, owned by WHA, by virtue of his employment and that the van was kept at 110 Torrington Way, where he lived with his son, Defendant Ryan Rush.

David Rush testified that he was a member of the Delaware National Guard and that on March 2, 2004 he was activated for a tour of duty in Germany. He left the van in

the driveway of his home. On March 3rd the van was to be picked up by a co-worker. It was not picked up. Mr. Rush testified that he was told by family members that an unsteady basketball goal on a pole in the driveway was in danger of falling on the van. He testified that he told his son that if the van was not picked up on March 3rd and the pole looked as if it might fall on the van, then his son (Defendant Rush) was to move the van and take down the pole. On cross examination Mr. Rush testified that he was aware that WHA's vehicle policy was that only the employee was authorized to operate the vehicle and that WHA's insurance policy provides that only the Executive Director of WHA could grant permission to operate the vehicle. He said he told his son to move the van, in spite of the policy regarding authorized drivers, in order to prevent the van from being damaged.

On March 4th at approximately 5:30 PM, as instructed by his father, Ryan Rush backed the van down the driveway at 110 Torrington Way. He said he saw a little girl on a bicycle fall off onto the sidewalk three or four doors down from his home. He decided to drive the distance to see if she needed assistance. By the time he arrived the girl had gotten up and moved on. At that point he had traveled only a few hundred feet along Torrington Way. He decided to turn the vehicle around by executing a "3 point turn", rather than take the vehicle onto Old Baltimore Pike. After he had reversed as part of the 3 point turn, he testified that he stopped before proceeding and that is when Ms. Mohr turned onto Torrington Way and the collision occurred. Defendant Rush had never driven the van before the time of the collision.

CONCLUSIONS OF FACT

Both Samantha Mohr and Ryan Rush claim to have been legally and prudently operating their respective vehicles at the time of the collision. What both parties do agree on is the damaged areas of each of the vehicles. Ms. Mohr said her vehicle was struck "right by my door," causing damage from the rear door to the bumper "above the (rear) wheel". Ryan Rush said that the damage to her vehicle was in "the back part" of her vehicle. Ms. Mohr said that the damage to the van was to the "front right (passenger side) headlight". That statement is not controverted by Defendant Rush.

The area of damage to the respective vehicles is most helpful in determining fault between the two drivers. Ms. Mohr says Defendant Rush collided with her vehicle after she turned onto Torrington Way. Defendant Rush says that he was stopped in his lane after reversing as part of a 3 point turn when Ms. Mohr's vehicle struck his vehicle. Since the damage to Ms. Mohr's vehicle was from the rear door back to the rear wheel bumper and the damage to Defendant Rush's van was to the passenger side headlight area, two factual conclusions become apparent to the Court. First, Ms. Mohr's vehicle could not have "come in wide" and struck Defendant's van or damage to Ms. Mohr's vehicle would have occurred much closer to the front of her vehicle. There is no testimony before the Court that her vehicle was traveling at such a high rate of speed so that, by swerving to avoid the collision she would have missed the van with the front of her vehicle and slid into his van, causing damage to the rear side of her vehicle. Second, the damage running from just behind the driver's side door rearward to the bumper "above the wheel," coupled with the fact that the only damaged area to the van was the

passenger side headlight area, clearly indicates that Ms. Mohr's vehicle was moving forward when struck by Defendant Rush's van.

Based on these findings of fact, the Court finds that Defendant Ryan T. Rush negligently operated a motor vehicle by failing to maintain a proper outlook, failing to maintain control of his vehicle, failing to give full time and attention to the operation of his motor vehicle and entering a lane of traffic on Torrington Way occupied by the vehicle driven by Samantha Mohr when such movement could not be made with safety, all violation of sections of Title 21, the Motor Vehicle Code of the State of Delaware. Mr. Rush's negligence directly and proximately caused personal injury to Ms. Mohr and damage to the vehicle she was operating.

FURTHER CONCLUSIONS OF FACT AND

CONCLUSIONS OF LAW

Plaintiff seeks to recover damages from Defendant Wilmington Housing Authority on two theories: negligent entrustment and agency. Each theory must be examined under the facts of this case.

In order to establish a claim of negligent entrustment, the following four elements must be met: 1) entrustment of an automobile, 2) to a reckless or incompetent driver, 3) whom the entrustor has reason to know is reckless or incompetent, and 4) it results in damages. *American Motorists Insurance Company v. Thomas, 2000 Del.C.P. Lexis 6 at *3, citing Carter v. Haley, Del. Super. WL960726 P. 3 (1998).*

Here, while John Rush did entrust a motor vehicle to Ryan Rush, the Court finds no evidence to support the requirement that Ryan Rush was a negligent or incompetent driver or that David Rush had reason to know that Ryan Rush was a reckless or

incompetent driver. Plaintiff merely established that Ryan Rush had not been a licensed driver for very long and that he had never before driven the van until the day of the collision. Plaintiff has failed to establish two elements required for a finding of negligent entrustment and therefore has not met their burden of establishing all of the required elements by a preponderance of the evidence.

Plaintiff also seeks to recover from Defendant Wilmington Housing Authority under a theory of agency or respondent superior. It is clear that WHA owned the van in question and that David Rush, in his capacity of employment by WHA, was permitted to operate the van. David Rush's operation of the van would obviously be as an agent of WHA.

The questions then to be decided by the Court, as the trier of fact in this non-jury case are: 1) whether the direction of agent David Rush to Defendant Ryan Rush to move the vehicle brought the actions of Defendant Ryan Rush within the doctrine of respondent superior, 2) whether an emergency existed and, 3) whether Defendant Rush's deviation of his route while moving the vehicle takes him outside the scope of his duties, prohibiting a finding of liability against Defendant WHA.

It is clear that, while David Rush was unavailable due to his overseas deployment with the Delaware National Guard, a situation arose where a basketball goal and pole had become unstable and was resting precariously on arborvitae bushes at 110 Torrington Way. The court also finds as a fact that the unstable pole and basketball goal was in danger of falling on the van owned by Defendant WHA. Based on the existence of the emergency need to move the van and David Rush's inability to move the van himself the only feasible solution, after the WHA employee failed to pick up the vehicle on March

3rd, was to delegate someone to move it. This creates an exception to the general rule that the relation of master and servant cannot be imposed on a person without his consent, express or implied. *Kirk v. Showell, Fryer & Co. Inc., 276 PA. 587*. The exception is that a servant may engage an assistant in case of an emergency where he is unable to perform the work alone. *Id.*

Defendant argues, factually, that because Defendant Rush waited until 5:30 PM on March 4th to move the vehicle, that the testimony of Defendant Rush that he was doing exactly that at the time is not credible. The Court is not persuaded that this is the case and has no basis on which to find the testimony incredible.

Defendant WHA argues that "liability of the owner for the negligence of another person in driving the vehicle is *usually* (emphasis added) based on the owner's supposed control over the driver at the time of the incident. *Finkbiner v. Mullins, Del. Super., 532 A.2d 609 (1987).* Further, that no principal-agent relationship exists where an owner "merely permits [the other] to use the vehicle for the latter's own purposes." *Id.* The Court agrees with Defendant WHA's statement of the law but finds two facts on which to distinguish this case from the "usual" circumstances. First, the emergency need to move the van to prevent damage to it is not done for the operator's purpose, but to protect the owner of the vehicle from suffering damage to it. Second, WHA employee David Rush's unavailability to move it provided no other viable option.

Finally, Defendant WHA argues that the fact that the accident took place three or four houses down from 110 Torrington Way shows that Ryan Rush was beyond the scope of moving the vehicle for safety purposes and, therefore, on a "frolic", taking his actions outside of the master-servant relationship.

Defendant Ryan Rush testified that, as he was moving the van, he noticed a girl on a bicycle fall on the sidewalk three or four houses down the street and he decided to drive there to help her. While this may seem like a convenient occurrence there was no impeachment of Defendant Rush's testimony on this point and the Court notes that he was in the process of turning the van around to proceed back toward 110 Torrington Way when the collision occurred. This is consistent with Defendant Rush's testimony.

The Court finds that the movement of the van, three or four houses away from 110 Torrington Way and being turned back toward it's point or origin at the time of the collision, does not constitution a "frolic" sufficient to take the matter outside of the doctrine of respondent superior. Here the action was so slight as to amount only to an incidental detour. *8 Am.Jur. 2d* § 763.

Based on the above findings of fact and analysis of the law, the Court finds that Defendant Wilmington Housing Authority is also liable for the negligent actions of Defendant Ryan T. Rush under the doctrine of respondent superior.

The Court directs the Clerk of the Court to enter judgment in favor of Liberty Mutual Group, pursuant to 21 Del.C. §2118, as subrogee of John Miller, Plaintiff, against Defendant Wilmington Housing Authority, in the amount of $4,941.79, plus pre and post judgment interest, at the legal rate, from March 4, 2002, until paid, plus costs.

SO ORDERED